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No. 07-(1)

In The
Supreme Court of the United States

MARIO NAVARRETE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Georgia erred in concluding, contrary to decisions from the Fourth, Fifth, Sixth, and Seventh Circuits, that there was no prejudice from counsel's failure to contact, investigate, or call witnesses whose testimony was crucial to establishing the defense's theory of the case, and would have crucially bolstered the defendant's own testimony at trial.

PARTIES TO THE PROCEEDING

The petitioner is Mario Navarrete, the defendant and defendant-appellant in the courts below. The respondent is the State of Georgia.

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INTRODUCTION

This Court should grant certiorari to restore uniformity in the interpretation of its ineffective-assistance standard in the context of failures by counsel to contact important defense witnesses that support the defense's theory of the case, and bolster the defendant's credibility when his credibility is a crucial issue. The Georgia Supreme Court erred in holding that petitioner, Mario Navarrete, was not prejudiced by his trial counsel's deficient performance in failing to contact, investigate, or call witnesses Navarrete had asked him to contact, whose testimony could have supported Navarrete's defense theory and bolstered his credibility. Navarrete was convicted of murdering Richard Davis, despite there having been no evidence that he stabbed Davis, and substantial evidence that he tried to stop Davis from being stabbed on the night of the murder. The evidence supporting Navarrete's guilt was entirely circumstantial, and the evidence about Navarrete's conduct on the night of the murder was equivocal.

The most damaging testimony in the State's case against Navarrete was an Army medic's hearsay testimony about a prior incident in Iraq during which Navarrete allegedly had tried to kill Davis. Navarrete's trial counsel, who was sick with cancer during the trial, failed to contact two witnesses Navarrete had asked him to contact. If counsel had contacted those witnesses, he would have uncovered testimony that directly rebutted the medic's hearsay account about the prior events in Iraq, and supported the

defense's theory that on the night of the murder Navarrete had not tried to murder Davis, but had tried to stop him from being murdered.

The Georgia Supreme Court concluded that counsel's conduct could not have prejudiced the defense. In so holding, it contradicted the rulings of federal courts that have held that counsel's performance is deficient when counsel fails to call witnesses whose testimony is central to the defense's theory of the case, and would bolster the defendant's credibility when his credibility is a central issue in the case. The Court should grant certiorari to correct this discrepancy between Georgia's and federal courts' interpretation of the constitutional standard for ineffective assistance of counsel.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia below is unpublished, and reproduced in the appendix to the petition. App. 1.

JURISDICTION

The Supreme Court of Georgia entered its judgment on January 25, 2008. That court denied Navarrete's timely rehearing petition on February 25, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment.

STATEMENT OF THE CASE

Mario Navarrete, Richard Davis, and five other men, Alberto Martinez, Jacob Burgoyne, Douglas Woodcoff, Gregory Pruitt, and Ricardo Rodriguez, were soldiers in the Third Infantry Division who served together in Iraq and Kuwait. App. 2. Shortly after the men returned to Fort Benning from Iraq, Richard Davis was murdered on a night when the five men went out drinking together. According to the uncontested testimony at trial, Martinez stabbed Davis to death, while Navarrete tried to stop the murder by begging Martinez not to stab Davis, taking a knife from Martinez, and urging Martinez to drive Davis to a hospital. App. 50-61.

Soon after their unit returned to Fort Benning in July 2003, Navarrete, Davis, Martinez, Burgoyne, and Woodcoff went out in Columbus for a night of

drinking, with Martinez driving them in his car. App. 2. The group went to a restaurant and then a club. *Id.* At the club, on the way out to the car, Burgoyne assaulted Davis, and continued assaulting him in the car. App. 3. Navarrete, too, shoved or punched Davis either outside the bar or in the car soon after leaving the club. *Id.* According to Navarrete, Davis had slumped onto him in the car, and he had shoved Davis to get him off of him. His shoves or punches (unlike Burgoyne's) stopped before Martinez stopped the car where Davis was murdered, however, and also stopped short of any attempt to seriously harm Davis. App. 51.

From the club, Martinez drove the car to a field, where the group got out, and Martinez then stabbed Davis to death. App. 3, 53-54. According to all three witnesses, including the State's witnesses, Navarrete repeatedly tried to stop the murder. Before Martinez stabbed Davis, Navarrete argued and pleaded with Martinez not to stab Davis and took a knife away from Martinez; after Martinez got another knife and stabbed Davis for the first time, Navarrete pleaded with Burgoyne to stop Martinez and with Martinez to stop and to take Davis to a hospital. App. 3, 49, 51-53, 55, 56, 57-59, 60-62. Instead, however, Martinez stabbed Davis multiple times. Martinez and Burgoyne then dragged Davis into the woods, drove to a gas station, bought lighter fluid, returned to the scene, and set the body on fire. App. 3-4, 58-59, 62.

Navarrete had no part in those actions, but stayed in the car. *Id.*

Martinez, Burgoyne, and Navarrete returned to the scene four days after the murder, and Martinez and Burgoyne, using supplies Martinez had procured, buried Davis's body. App. 4. Navarrete testified he went unwillingly, out of fear of Martinez and Burgoyne. App. 63-65. Davis's body was discovered months later. Burgoyne pleaded guilty to voluntary manslaughter, robbery, possession of a knife, and concealment of a body; Woodcoff pleaded guilty to concealment of a body; both men testified as State's witnesses at trial. App. 2 n.2. Navarrete stood trial with Martinez. He was charged with malice murder, felony murder with aggravated assault as the predicate felony, aggravated assault, armed robbery, possession of a knife, felony murder, and concealment of a body.

At trial, the primary testimony that Navarrete had ever shown any intent to seriously harm Davis came from army medic Edward Wulff, who testified over defendants' objections about hearsay statements Davis supposedly made when Davis, Wulff, and the defendants were serving together overseas. App. 5. Wulff stated that Davis had come to him one night shortly before the unit returned to the U.S. for treatment of a cut on his hand and told him that Davis had been drinking with Martinez and Navarrete on a hill near the base where the unit was stationed, that they had both assaulted him, and that because of the assault Davis feared for his life. App. 47-48. Wulff

testified that Davis was intoxicated when Wulff treated him, and that for that reason he did not believe Davis's story when he heard it. App. 6, 66-67.

Navarrete, who testified later during the trial, gave a different version of the events of that night on the hill. App. 63-66. He testified that Davis had cut his hand during a "blood brothers" ritual, at which were present two other soldiers named Pruitt and Rodriguez. *Id.* Navarrete had told trial counsel during the investigative stage of the defense that Pruitt and Rodriguez were witnesses who could offer helpful testimony, yet trial counsel did not try to locate them, interview them, or investigate their testimony in any way prior to trial.[1] App. 28-30. Further, despite Navarrete's testimony at trial that those witnesses were present on the hill and specifically could have rebutted Wulff's testimony, trial counsel still did not try to locate them or call them to testify at trial. App. 28-30. In fact, trial counsel called no defense witnesses at all besides Navarrete himself. Ironically, Pruitt was present in the courthouse while the trial was going on, subpoenaed by the prosecution and sequestered outside the courtroom. App. 40-41.

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[1] Counsel could not remember whether Navarrete specifically mentioned to him during the investigation that Pruitt and Rodriguez had been present for the hill incident. App. 28-29. Counsel stated he had probably been given a copy of Wulff's statement to investigators, but could not remember having read it. App. 26-30; New Trial Hearing Transcript 69-73, 78-80.

Wulff's hearsay testimony about Navarrete's actions on the hill, along with Navarrete's accompanying Burgoyne and Martinez when they went to hide the body, were the two major themes of the prosecution's case against Navarrete. The prosecution heavily emphasized Wulff's testimony in its closing as evidence that Navarrete was guilty of conspiring with Martinez to kill Davis, mentioning it five separate times. App. 67-69, 69-72, 73. The prosecution specifically noted Wulff's testimony had not been impeached. App. 68-70. Finally, in rebuttal closing, the prosecution focused on the defense's failure to call Pruitt and Rodriguez as showing that Navarrete lied about how Davis injured his hand: "Why didn't they call Pruitt? . . . Why didn't they call Rodriguez? . . . Why, because it wasn't the truth." App. 74-75. The jury acquitted Navarrete of malice murder and armed robbery, but convicted him of aggravated assault, possession of a knife, felony murder, and concealment of a body. App. 1.

New appellate counsel agreed to represent Navarrete, and moved for a new trial, on the grounds, *inter alia*, of ineffective assistance of counsel. The defense motion for new trial cited *Strickland* v. *Washington*'s standard for ineffective assistance claims, which is materially identical to the Georgia state-law standard for such claims. Am. Mot. New Trial at 5; *White* v. *State*, 216 Ga.App. 583, 583 (1995) ("There exists no substantial difference in the legal standard to be employed in resolving claims of ineffective

assistance of counsel under the United States Constitution and under the Georgia Constitution of 1983.").

At the new trial hearing, the defense presented three witnesses. The first defense witness was trial counsel's doctor, who testified that during the time leading up to trial and during trial he had been treating Navarrete's counsel for cancer with chemotherapy. App. 18-21. The doctor testified that his notes showed that during the time of trial, trial counsel was suffering from "hand-foot syndrome," a side effect of chemotherapy that causes blistering and peeling of the skin on the hands and feet, the possible effects of which include loss of concentration and inability to focus. App. 10-11, 19, 21. The second witness was Navarrete's trial counsel.[2] He testified that, during trial, his concentration and focus were impaired by his ongoing chemotherapy. App. 11, 24-26. He testified that during his investigation Navarrete had told him about Pruitt and Rodriguez and asked him to contact them as witnesses, but that he failed to do so or to investigate their testimony in any way, because he simply forgot. App. 22-25. He further testified he had not called or attempted to contact them during trial, even after Navarrete testified that the two men were present at, and would have contradicted Wulff's hearsay account of, the incident on the hill. App. 22-25, 27-30. Finally, he testified that his

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[2] Trial counsel is no longer representing Navarrete.

decisions not to investigate or call the witnesses were oversights, not strategic decisions. App. 27-29.

The final defense witness was Sgt. Gregory Pruitt. Sgt. Pruitt testified that he had been with Davis, Martinez, Navarrete, and Rodriguez on the hill near the base on the night Davis hurt his hand. App. 31-41. He testified, as had Navarrete, that Davis, Martinez, and Navarrete were performing a 'blood brothers' ritual, during which Davis cut his hand too deep. App. 35-37. He also testified that Martinez had assaulted Davis that night and that Navarrete had stepped in to try and stop the assault. App. 35-37. Finally, he testified that he had not previously told his story to anyone because no investigator or prosecutor had asked him about the events on the hill. App. 39. The State's evidentiary presentation at the new trial hearing was devoted largely to attacking Sgt. Pruitt's credibility, by arguing that he had not previously told his story to investigators. The trial court overruled the motion for new trial.

On appeal, Navarrete argued ineffective assistance of counsel, error in the admission of the hearsay testimony of Medic Wulff, and insufficiency of the evidence. Once again, Navarrete cited *Strickland* v. *Washington* in support of his ineffective assistance argument, and his reply brief cited several federal cases demonstrating that counsel's conduct was prejudicially deficient under the *Strickland* standard. Br. of Appellant at 10; Reply Br. of Appellant at 8-12.

The Supreme Court of Georgia concluded that there was sufficient evidence to support the convictions. App. 5. It held that the admission of Medic Wulff's testimony was error, but was harmless under the circumstances. App. 6-10. Finally, on the issue of ineffective assistance, the court ruled that counsel's conduct had not prejudiced the defense, because "the testimony would not have exonerated him," and because there were some contradictions between Pruitt's story and Navarrete's. App. 12. It did not address the question whether counsel's performance had in fact been deficient. *Id.* The court's opinion, like the appellant's submissions, applied the Georgia interpretation of the *Strickland* standard for evaluating ineffectiveness claims. App. 10, 13.

REASONS FOR GRANTING THE WRIT

I. The Georgia Supreme Court Erred In Concluding There Was No Prejudice From Counsel's Failure To Contact Witnesses Whose Testimony Would Have Supported the Central Defense Theory of the Case.

During the trial of this case, trial counsel was undergoing chemotherapy. As he testified at the new trial hearing, the chemotherapy treatment caused him to suffer loss of concentration, loss of short-term memory, drowsiness, and dizziness leading up to and during Navarrete's trial. App. 22-24. His doctor confirmed that these were possible consequences of the "hand-foot syndrome" counsel was suffering

during that time. App. 19-20. Counsel's ill health appears to have been noticed by the trial court, who during counsel's cross-examination of key witness Jacob Burgoyne offered counsel the option of sitting to finish the examination "given the circumstances." App. 59-60.

Trial counsel's ill health led him to err by not calling a crucial witness, Gregory Pruitt, whose testimony could have undermined or altogether excluded the State's most incriminating evidence against Navarrete, the testimony of Edward Wulff, and who could have bolstered Navarrete's credibility. That error constituted defective performance that prejudiced Navarrete's defense and required reversing the convictions. See *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Harrison* v. *Quarterman*, 496 F.3d 419, 427 (5th Cir. 2007); *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 356 (6th Cir. 2006). The Georgia Supreme Court, however, erroneously concluded that there was no prejudice from counsel's failure to contact Pruitt, a decision in conflict with the rulings of federal circuit courts that have found prejudice when counsel fails to contact witnesses whose testimony was central to the defense's theory of the case. See *Harrison*, 496 F.3d at 427 ("Our sister circuits have held that counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness's absence. We agree." (citations omitted)).

A. Trial Counsel's Performance Was Deficient.

Although the Georgia Supreme Court did not consider whether trial counsel's performance was deficient, it clearly was. Trial counsel failed to call witnesses who would have corroborated Navarrete's testimony and contradicted Wulff's hearsay testimony about what happened on the night when Davis hurt his hand, testimony the State pointed to as proving that Navarrete had prior murderous intent towards Davis. Counsel acknowledged that Navarrete told him those witnesses would offer helpful testimony, and that he simply forgot to contact them, investigate their testimony, or subpoena them to the trial. He further testified that he did not attempt to call either man at trial even after Navarrete testified that the two men were present on the night when Navarrete had allegedly assaulted Davis and could testify that he had not assaulted him. In both cases, counsel testified, those omissions were oversights, not strategic decisions. That is deficient performance. See, *e.g.*, *Stewart*, 468 F.3d at 356 ("Where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing defendant's release, counsel's inaction constitutes negligence, not trial strategy." (quotation, citation, and internal marks omitted)); *Anderson* v. *Johnson*, 338 F.3d 382, 393 (5th Cir. 2003) (complete failure to investigate witness, for no strategic reason, was unreasonable and deficient); *Griffin* v. *Warden, Maryland Corr.*

Adjustment Ctr., 970 F.2d 1355 (4th Cir. 1992); *Harris* v. *Reed,* 894 F.2d 871, 878 (7th Cir. 1990) (failure to call witnesses that would have "greatly aided [defendant's] case" was ineffective assistance); *Code* v. *Montgomery*, 799 F.2d 1481, 1484 (11th Cir. 1986) (ineffective assistance in failure of counsel to investigate testimony of two alibi witnesses suggested by defendant).

Indeed, there could have been no strategic reason not to at least investigate Pruitt and Rodriguez's testimony, because counsel had no reasonable basis to think they would be unhelpful. *Towns* v. *Smith,* 395 F.3d 251, 258 (6th Cir. 2005) ("This duty [to investigate] includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence."); *Bryant* v. *Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) ("[A]n attorney must engage in a reasonable amount of pretrial investigation and at a minimum, . . . interview potential witnesses . . . and make an independent investigation of the facts and circumstances in the case." (quotation omitted)); *Tenorio* v. *State*, 261 Ga.App. 609, 613 n.14 (2003) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (quotation omitted)).

In fact, had they been contacted or called at trial, Pruitt and Rodriguez would have corroborated Navarrete's testimony by confirming that he did not assault Davis on the hill but instead, as on the night of the murder, tried to prevent Davis from being

assaulted.[3] App. 31-41. They would have at the same time contradicted, or even caused to be excluded, Wulff's hearsay testimony to the contrary. Counsel's failure to investigate those witnesses, not based on strategy but instead on oversight due to illness, was deficient performance. See, *e.g.*, *Stewart*, 468 F.3d at 356; *Richardson* v. *State*, 189 Ga.App. 113, 114 (1988) (ineffective assistance when defendant told counsel of two alibi witnesses but counsel did not speak to them).

B. Trial Counsel's Deficient Performance Prejudiced the Defense.

Trial counsel's errors prejudiced the defense because calling Pruitt and Rodriguez would have greatly undermined the State's central evidence that Navarrete was involved in a "conspiracy" to murder Davis. See App. 68-69 ("That [Wulff's testimony], I submit to you, allows you to draw the inference of the existence of a conspiracy."). At the same time, Pruitt's testimony would have greatly bolstered the defense's central theory of the case, that Navarrete was not involved in any such conspiracy but instead tried to stop Davis's murder on the night he was killed. And,

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[3] Appellate counsel located Pruitt, who testified at the new trial hearing. Counsel also attempted to locate Rodriguez, who has since left the Army, but were unable to do so. If an attempt had been made to locate him at the time of the underlying events and investigation, it is more likely he could have been found.

it would have bolstered Navarrete's credibility generally, which was a central issue in the case.

Deficient performance is prejudicial when it creates a reasonable probability – a probability "sufficient to undermine confidence in the outcome" – that the outcome would have been different had counsel performed competently. *Strickland*, 466 U.S. at 694; *Stapp* v. *State*, 273 Ga.App. 899, 903 (2005) (performance is prejudicial when "a reasonable probability exists that, but for the deficiency, the outcome of the trial would have been different"). Here, there is more than a reasonable probability that effective assistance would have produced a different outcome.

First, had trial counsel called Pruitt and Rodriguez, it would have at least undermined, or at most totally excluded, the most harmful testimony in the State's case. Wulff's hearsay testimony was the State's only evidence that Navarrete had any wish to seriously harm Davis or had any prior agreement with Martinez to do Davis harm, because the evidence at trial showed that on the night of the murder Navarrete tried to *stop* Martinez from murdering Davis. Cf. *Stewart*, 468 F.3d at 344, 356-61 (finding prejudice from failure to investigate testimony of witness that would have contradicted testimony of state's main motive witness). The State heavily emphasized Wulff's story in opening and closing arguments, claiming it showed that Navarrete had conspired with Martinez to kill Davis on the night of the murder. App. 67-72. Further, the State specifically

noted that Wulff's testimony had been unimpeached as grounds for the jury to believe his story and infer that Navarrete was guilty of conspiring to commit murder. App. 68-69. If the jury had heard from Pruitt, it would have heard an account that impeached Wulff's testimony about the hill incident on the crucial points that Davis had hurt his hand in a blood-brothers ritual and that Navarrete had not assaulted Davis. And, that account would have bolstered the defense's central theory, that Navarrete on the night of the murder had no intent to harm Davis but had tried to stop him from being stabbed.

Indeed, the calling of Pruitt and Rodriguez should have caused Wulff's testimony to be excluded entirely, because the availability of those contemporaneous witnesses would make clear that Wulff's testimony was inadmissible under the necessity exception to the hearsay doctrine. App. 9 (Georgia Supreme Court concluding that Wulff's testimony was erroneously admitted hearsay). Without Wulff's testimony in evidence, the State would have had no evidence that Navarrete had any prior intent to do Davis serious harm.

At the same time, Pruitt and Rodriguez's testimony would have bolstered the defense's central theory. Pruitt's account would have reinforced Navarrete's and Burgoyne's testimony that on the night of the murder Navarrete tried to stop Martinez from stabbing Davis, and then begged Martinez to take Davis to the hospital, by indicating that Navarrete had done the same thing before overseas. The failure

to call witnesses that could have bolstered Navarrete's central narrative about his behavior towards Davis was prejudicial. *Harrison*, 496 F.3d at 427; *Griffin*, 970 F.2d at 1359-60. In particular, because Pruitt's account was closer to Navarrete's story about the hill than Wulff's, it would have improved Navarrete's credibility with the jury, and thus made the jury more likely to believe his account of what happened on the night of the murder. Compare *Harrison*, 496 F.3d at 427 ("Where is Tony West? . . . Where is Tony West? Where is Tony West to corroborate their story? Can't do it. Can't corroborate it.") with App. 74-75 ("Why didn't they call Pruitt? . . . Why didn't they call Rodriguez? . . . Why, because it wasn't the truth."); App. 73 (prosecution cites contradiction between Navarrete's and Wulff's stories as evidence that Navarrete was generally a liar). The jury's evaluation of Navarrete's credibility was absolutely critical, because in order to convict, the jury necessarily had to disbelieve Navarrete's own account (corroborated by the other State's witnesses) that he had tried to stop the stabbing.

Trial counsel's deficient performance deprived Navarrete of crucial opportunities to undermine or even eliminate the prosecution's central testimony on motive and intent, and to bolster his own testimony he had no wish to seriously harm Davis. Especially when the other evidence against Navarrete was so thin, and the State's case depended so heavily on discrediting him, this creates at least a reasonable probability that, had counsel been effective, the jury

would have voted to acquit. See *Anderson*, 338 F.3d at 392 (finding prejudice from failure to investigate and call helpful witness when state's evidence was "weak"); *Code*, 799 F.2d at 1484 (prejudice from failure to investigate alibi witnesses when "Code's trial was a mere swearing match"); *Richardson*, 189 Ga.App. at 114 (when evidence was "not overwhelming," a "reasonable probability exists that the presence of defendant's alibi witnesses would have affected the result"). Counsel's errors therefore prejudiced Navarrete's defense, and the convictions should have been reversed.

C. The Georgia Supreme Court's Ruling Conflicts With Rulings From Federal Circuit Courts.

The Georgia Supreme Court's ruling that there was no prejudice from counsel's failure to contact Pruitt and Rodriguez conflicts with the rulings of federal circuit courts that have concluded that prejudice exists when counsel fails to contact witnesses whose testimony is central to establishing the defense's theory of the case. See, *e.g.*, *Harrison*, 496 F.3d at 427; *Stewart*, 468 F.3d at 360. Counsel's failure in this case is materially indistinguishable from the failures found to be deficient in those cases and the other federal circuit cases cited above.

Federal circuits have also held that deficient performance is prejudicial when it leads to the failure to elicit testimony that would have bolstered the

defendant's credibility, when the defendant's credibility is a critical issue and critically placed in issue by the prosecution. See, *e.g.*, *Harrison*, 496 F.3d at 427 ("Where is Tony West? . . . Where is Tony West? Where is Tony West to corroborate their story? Can't do it. Can't corroborate it."). Similarly, in *Griffin*, the Fourth Circuit found deficient performance when the defense failed to call alibi witnesses, and the prosecution seized on this in closing:

> The entire case hinges on the credibility of the witnesses. Who do you believe? Do you believe . . . the security officers . . . or do you believe Donald Gary Griffin, who makes the self-serving statement, I was at home at the time that the alleged incident took place, . . . I was in my pajamas at 3:30 in the afternoon when friends of mine, *none of which you heard from,* come in and they went to a friend's house?

970 F.2d at 1359-60 (emphasis in original).

In this case, the prosecution engaged in a nearly identical rhetorical maneuver to the ones in *Harrison* and *Griffin*: "Why didn't they call Pruitt? . . . Why didn't they call Rodriguez? . . . Why, because it wasn't the truth." App. 74-75. That was just as prejudicial to the defense as the similarly debilitating failure to call exculpatory witnesses in cases like *Harrison* and *Griffin*.

Yet the Georgia Supreme Court concluded that there was no prejudice in counsel's admittedly non-strategic failure to ever contact Pruitt and Rodriguez.

Its justification for doing so, that the Pruitt testimony would not have "exonerated" Navarrete, is simply inconsistent with federal circuit law from numerous circuits holding that when defense counsel fails to investigate the testimony of a witness that would have significantly aided the defense's central theory and bolstered the defendant's story on a crucial issue, that is prejudicially deficient performance. See, *e.g.*, *Harrison*, 496 F.3d at 427; *Griffin*, 970 F.2d at 1359-60; *Stewart*, 468 F.3d at 356; *Towns*, 395 F.3d at 258; *Harris*, 894 F.2d at 878. Those cases, and others like them, do not require, in order to find prejudice, that the omitted testimony would have completely exonerated the defendant, or that the omitted testimony have been about the crime itself. See, *e.g.*, *Washington* v. *Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (failure to call additional alibi witnesses besides one that was called was prejudicial); *Stewart*, 468 F.3d at 356 (prejudicially ineffective assistance in failure to investigate testimony of witness that would have contradicted state's witness's testimony about crucial motive-related events prior to the actual crime).

The Georgia Supreme Court's application of a standard requiring that the uninvestigated testimony must have completely exonerated the defendant, App. 12, is out of step with the precedents from the federal circuits, and the teaching of this Court in *Strickland* that deficient performance is prejudicial when it creates a probability "sufficient to undermine confidence in the outcome" that the outcome would have been different had counsel performed competently.

Strickland, 466 U.S. at 694. Pruitt's testimony was crucial to establishing Navarrete's theory of the case: that he did not conspire to murder Davis, but instead tried to stop him from being murdered. It rebutted the most damning piece of testimony in the state's case. It shored up Navarrete's credibility on a critical point of difference between the State and Navarrete's stories. Counsel's failure to investigate and put on that testimony is more than enough to create a reasonable probability of a different outcome.

"Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man for forty years." *Griffin*, 970 F.2d at 1359. Similarly, weak circumstantial evidence of Navarrete's guilt, already rebutted by substantial direct trial eyewitness evidence of Navarrete's attempt to prevent the murder, is a weak basis to sentence Mario Navarrete to spend the rest of his life in prison, when Navarrete asked his lawyer to contact witnesses who could have rebutted the State's best evidence that Navarrete ever had any motive to do Davis harm, and the lawyer simply failed to make any effort at all to do so. By concluding there was no prejudice from counsel's failure to contact Pruitt and Rodriguez because the testimony would not have completely exonerated Navarrete, the Georgia Supreme Court both erred and contradicted the decisions of federal circuit courts that have, rightly, concluded that there is necessarily prejudice when counsel does not contact witnesses whose testimony is centrally important to the

defense's theory, and to the defendant's own credibility, when his credibility is a central issue. This Court should grant certiorari to restore uniformity in the interpretation of its *Strickland* standard in the context of failures by counsel to contact important defense witnesses.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2008

In the Supreme Court of Georgia

Decided: JAN 28 2008

S07A1456. NAVARRETE v. THE STATE.

THOMPSON, Justice.

Mario Roberto Navarrete was convicted of felony murder, aggravated assault, and other crimes arising from the stabbing death of Richard Davis.[1] On appeal, Navarrete asserts that the evidence was constitutionally insufficient to support his convictions, that the trial court improperly admitted certain hearsay testimony under the necessity exception, and that he was denied effective assistance of trial counsel. Finding no reversible error, we affirm.

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[1] The crimes were committed on July 12, 2003. On February 17, 2004, Navarrete was indicted along with Alberto Martinez, Jacob Burgoyne, and Douglas Woodcoff. Navarrete was charged with malice murder, felony murder while in the commission of an aggravated assault, aggravated assault, possession of a knife during the commission of a crime, armed robbery, and concealing the death of another. Appellant and Martinez proceeded to a joint jury trial which commenced on January 23, 2006. On January 27, 2007, the jury acquitted appellant of malice murder and armed robbery but convicted him of the remaining charged offenses. Martinez was convicted of all charges except armed robbery. Navarrete was sentenced on the same day to life imprisonment plus 20 concurrent years for aggravated assault and consecutive terms for weapon possession and concealing a death. A motion for new trial was filed on February 7, 2006, amended on November 21, 2006, and denied on January 5, 2007. A motion for out-of-time appeal was granted on May 25, 2007 and a notice of appeal was filed on the same day. The case was docketed in this Court on June 11, 2007. Oral argument was heard on October 10, 2007.

Viewed in a light most favorable to the verdict, the evidence established that Navarrete, his co-indictees Jacob Burgoyne, Douglas Woodcoff, and Alberto Martinez, as well as the victim, Richard Davis, served together as infantrymen in the United States Army.[2]

The crimes occurred soon after the five men returned to Fort Benning, Georgia, from a six-month deployment to Iraq and Kuwait. On the evening in question, Martinez drove Navarrete, Burgoyne, Woodcoff, and Davis to a Hooters restaurant to celebrate their homecoming. On the way there, Martinez showed the others a new knife which he kept in the console of his car. The five men spent the next few hours at the restaurant having dinner and consuming several pitchers of beer. Martinez then drove them to an adult entertainment club. At some point in the evening, the club's bouncer approached Woodcoff and Martinez and asked them to remove Davis because he was visibly intoxicated. Woodcoff and Martinez escorted Davis to Martinez's car, placed him in the back seat, and returned to the club where they continued drinking. Approximately two hours later, the four men left the club and returned to the car.

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[2] Burgoyne pled guilty to voluntary manslaughter and other charges, and was sentenced to 20 years in prison; Woodcoff pled guilty to the only charge for which he was indicted, concealing the death of another, and was sentenced to probation. Both testified for the State in the joint trial against Navarrete and Martinez.

Burgoyne pulled Davis out of the back seat and without provocation, began to beat him. The others stood by but made no attempt to stop the fight. Subsequently, the five men again got into Martinez's car; Navarrete and Burgoyne sat in the back seat with Davis between them, and Woodcoff was in the front passenger seat. Martinez drove to a rural, wooded area about 20 minutes away. During the drive, Navarrete and Burgoyne continued to beat Davis, despite Woodcoff's entreaties for them to stop.

Martinez stopped the car, and ordered everyone to get out. Martinez, Burgoyne, and Navarrete formed a circle around Davis. Burgoyne struck Davis several times and Davis began to walk toward Martinez and Navarrete. Martinez then produced a knife and stabbed Davis, causing him to fall to the ground. Navarrete and Burgoyne urged Martinez to stop the attack but Martinez disregarded their pleas; Burgoyne then walked back to the car and Navarrete followed. Moments later, Davis got to his feet but Martinez grabbed him around the neck and resumed stabbing him. Davis fell to his knees and the attack continued with Martinez inflicting a minimum of 33 knife wounds. The others observed but did nothing to aid Davis. After Davis stopped moving, Martinez and Burgoyne placed his body further into the woods and removed his identification. The four men returned to the car and Martinez drove a short distance to a clearing where they made the decision to burn the body. Martinez drove to a convenience store and Burgoyne collected money from the others to purchase lighter

fluid and matches. Upon returning to the crime scene, Martinez and Burgoyne poured lighter fluid on the body and set it on fire; Navarrete and Woodcoff remained in the car. Martinez then drove the men to their barracks at Fort Benning.

Several days later Martinez returned to the crime scene where he detected the odor of the victim's decaying body and he decided to bury it. He, along with Navarrete and Burgoyne, returned to the scene that night supplied with latex gloves, a shovel, and a change of clothes. Navarrete stood lookout while Burgoyne attempted to bury the body.

1. Navarrete asserts that the evidence only establishes his "mere presence" during the commission of the offense of aggravated assault and felony murder predicated on aggravated assault. Thus, he claims that the evidence was insufficient to support those convictions.

"Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime." OCGA § 16-2-20(a). "'While mere presence at the scene of a crime is not sufficient evidence to convict one of being a party to a crime, criminal intent may be inferred from presence, companionship, and conduct before, during and after the offense.' [Cit.]" *Strozier v. State,* 277 Ga. 78, 79 (2) (586 SE2d 309) (2003). See also *Byrum v. State,* 282 Ga. 608 (1) (652 SE2d 557) (2007). Compare *James v. State,* 260 Ga. App. 350 (1) (579 SE2d 750) (2003) (evidence insufficient where defendant

was not present during the crimes and conduct before and after did not support the inference that he knew of the plan and shared in the criminal intent).

Navarrete's intent to commit the crimes may be inferred from evidence that he assaulted Davis in the back seat of the car during the 20-minute drive to the wooded area, that he participated in the plot to burn the body, that he did not attempt to report the crime in the days following the murder even when questioned by the military authorities, and that he stood lookout while Martinez and Burgoyne buried the body days later. In addition, Navarrete was aware in advance of the stabbing that Martinez was armed with a knife and he stood by and watched Martinez commit an aggravated assault on Davis before he made any effort to intervene.

The evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Navarrete was guilty of the crimes for which he was convicted. *Jackson v. Virginia,* 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. Over Navarrete's hearsay objection, Army medic Edward Wulff was permitted to testify about an incident that occurred in Iraq just prior to the unit's redeployment to Fort Benning. Wulff testified that he was attached to the same platoon as Navarrete and Davis and that he and Davis had become good friends. One night Davis came to his barracks and awakened him seeking treatment for a wound to the back of his hand. Wulff testified that he asked

Davis how he injured his hand, and that Davis replied he had been drinking with Martinez and Navarrete and they decided to become "blood brothers"; Martinez and Navarrete hit him and choked him; and Davis thought they were going to kill him. It was also elicited from Wulff that Davis was extremely intoxicated when he made these remarks, and when Wulff advised Davis to report the incident, Davis refused and stated that if anyone were to ask him about it, he would lie and say he fell and caught his hand in a thorn bush. The next morning, Wulff sought out Martinez and Navarrete and inspected their hands for injuries, but observed none. Wulff did not report the injury or the alleged threat because he thought it was just a "drunk thing" and not really serious. The trial court admitted the evidence under the necessity exception to the hearsay doctrine.[3]

> In order for hearsay to be admitted under the necessity exception, two requirements must be satisfied: "necessity" and "particularized guarantees of trustworthiness." [Cits.] "Necessity" is demonstrated when the declarant is deceased, when the statement is shown to be relevant to a material fact, and when the statement is more probative of the material fact than other evidence that may be produced and offered. [Cit.] The requirement of "particularized guarantees of

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[3] Because of the non-testimonial nature of the hearsay declarations, *Crawford v. Washington*, 541 U. S. 36 (124 SC 1354, 158 LE2d 177) (2004) is not implicated.

> trustworthiness" is satisfied when the declaration is coupled with "circumstances which attribute verity to [the declaration]."

Culmer v. State, 282 Ga. 330, 331 (2) (647 SE2d 30) (2007). Without deciding whether the hearsay was "necessary" under the foregoing test, we hold that the declarations lacked the requisite component of "trustworthiness" and, therefore, should not have been admitted under the necessity exception.

In evaluating the trustworthiness element, the trial court should look to the totality of the circumstances surrounding the making of the declaration. *Belmar v. State,* 279 Ga. 795 (2) (621 SE2d 441) (2005). Our review of the record persuades us that the State, as proponent of the hearsay, failed to demonstrate sufficient indicia of trustworthiness for the statements to be admissible under the necessity exception. While a close relationship between Davis and Wulff may militate in favor of admission, see *Turner v. State,* 281 Ga. 647 (3) (a) (641 SE2d 527) (2007), that one factor alone is not dispositive, especially where the totality of the circumstances dictate otherwise. See *Carr v. State,* 267 Ga. 701 (3) (482 SE2d 314) (1997), overruled on other grounds, *Clark v. State,* 271 Ga. 6 (5) (515 SE2d 155) (1999). See also Paul S. Milich, *Georgia Rules of Evidence,* 2d. Ed., § 19.32.

Wulff acknowledged that Davis was intoxicated when he made the statements, and Wulff dismissed the alleged threats on Davis' life as the ramblings of a

"drunk" person. See *Messick v. State,* 276 Ga. 528 (3) (580 SE2d 213) (2003) (statements to a self-described acquaintance after an all-day drinking session lacked sufficient guarantees of trustworthiness and were inadmissible under the necessity exception). See also *U. S. v. Two Shields,* 497 F3d 789 (8th Cir. 2007) (extreme intoxication is one consideration in the totality of the circumstances evaluation of the reliability of a hearsay statement). Since Davis had consumed the alcohol at the time that Navarrete and Martinez made the alleged threats, it is also reasonable to infer that Davis was intoxicated when he witnessed the events, thus undermining his credibility as a witness. See generally *Teat v. State,* 237 Ga. App. 867 (2) (a) (516 SE2d 794) (1999) ("any possible state of intoxication goes to the credibility of the witness"), citing *Whitus v. State,* 222 Ga. 103 (2) (149 SE2d 130) (1966), rev'd on other grounds in *Whitus v. Georgia,* 385 U. S. 545 (87 SC 643, 17 LE2d 599) (1967).

In addition, Davis told Wulff that he had no compunctions about lying to his chain of command concerning the nature of his injury, thus demonstrating his lack of veracity. "The test is whether the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." (Punctuation omitted.) *Yancey v. State,* 275 Ga. 550, 553 (2) (570 SE2d 269)

(2002)[4]. Here, the truthfulness of the statement could have been challenged had the declarant been subject to cross-examination. Although a trial court's determination of trustworthiness will not be disturbed absent an abuse of discretion, *Culmer,* supra at (2), we conclude under the totality of the circumstances, that Davis' declarations to Wulff were not "coupled with circumstances which attribute verity to it," *Belmar,* supra at 797 (2), and thus are inherently untrustworthy.

We next must assess whether the error in admitting the hearsay portion of Wulff's testimony was harmless. "The erroneous admission of hearsay testimony is harmless where it is cumulative of legally admissible evidence of the same fact, where it does not touch on the central issue of the case, or it could not have contributed to the verdict in light of eyewitness testimony regarding the crime." *Myers v. State,* 275 Ga. 709, 713 (2) (572 SE2d 606) (2002). See also *White v. State,* 273 Ga. 787 (4) (546 SE2d 514) (2001) (erroneous admission of hearsay is harmless where there is a positive identification and other corroborative circumstances). According to the account of two eyewitnesses, Navarrete was implicated as a party to the crimes for which he was convicted. While, under OCGA § 24-4-8, the testimony of a single accomplice in a felony prosecution is not sufficient to establish a fact, "the testimony of one accomplice may be used to

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[4] Decided prior to *Crawford v. Washington,* supra.

corroborate that of another." *Williams v. State,* 280 Ga. 584, 586 (1) (630 SE2d 370) (2006). In addition, Navarrete's participation and criminal intent could be adduced from his conduct before, during and after the events. *Byrum,* supra at (1). Under the circumstances, we hold that the hearsay evidence could not have contributed to the verdict. Id.

3. Navarrete submits that he was denied constitutionally effective assistance of trial counsel because counsel failed to adequately investigate the case, and failed to offer the testimony of two soldiers who allegedly were present during the "blood brothers" incident in Iraq and who could have rebutted Wulff's hearsay testimony that Navarrete had threatened Davis.

"To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficiency so prejudiced defendant that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different." *Patel v. State,* 279 Ga. 750, 751 (620 SE2d 343) (2005), citing *Strickland v. Washington,* 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984).

At the hearing on the motion for new trial, trial counsel's physician testified that several months prior to Navarrete's trial, counsel had been diagnosed with cancer and that he began a course of chemotherapy and received treatments both prior to and after the date of trial; that contemporaneous with Navarrete's

trial, counsel reported experiencing a side effect of chemotherapy which causes peeling of the skin on the hands and feet; but that counsel did not complain about a lack of mental acuity until eight months after the conclusion of Navarrete's trial. Trial counsel testified that his concentration and ability to write were compromised during the trial. When asked about his knowledge of the two potential witnesses to the "blood brothers" incident, counsel stated that in a pretrial interview Navarrete named the two men as potential character witnesses, and that at some time during trial Navarrete told him the two were present when he cut his hand "and could testify to that." Counsel could offer no explanation for his failure to follow up on that information.

Sergeant Pruitt, one of the two soldiers who allegedly witnessed the "blood brothers" incident testified for the defense at the motion hearing.[5] He stated that Martinez and Davis had gotten into an altercation at the time of the incident and that Navarrete tried to stop it. Although Pruitt acknowledged on cross-examination that he had been interviewed numerous times after Davis' murder by both military and civilian investigators and was expressly asked if he knew of any problems with anyone in his platoon, he never disclosed the "blood brothers" incident. Assistant District Attorney Jackson who

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[5] The second soldier had left the service and could not be located.

participated in the trial of the case was called to rebut Pruitt's hearing testimony. ADA Jackson testified that Pruitt, who had been subpoenaed as a witness for the State at trial (as were other members of the platoon), was interviewed by him prior to trial and asked what if anything he knew about the case and why someone may have been intent on harming Davis. Pruitt replied, "I don't know anything. I don't even know why I'm here. . . . Everything I know is in the statements you've got." And as a result, Pruitt was excused from his subpoena.

"In ruling on an ineffectiveness claim, this Court need not analyze the deficient performance prong if the Court determines the prejudice prong has not been satisfied." *Fortson v. State,* 280 Ga. 435, 436 (2) (a) (629 SE2d 798) (2006). As in *Fortson,* "[e]ven if the witness had testified exactly as [Navarrete] claims, [Navarrete] has not demonstrated that there is a reasonable probability that the outcome of the trial would have been different, as the testimony would not have exonerated him." Id. Furthermore, Pruitt's testimony concerning the incident differed from Navarrete's trial testimony in several material respects, including his identification of the persons who were present, and the area of the injury to Davis' hand. Thus, had Pruitt been called as a witness at trial, his testimony actually may have been detrimental to the

defense. Accordingly, we hold that the prejudice prong of *Strickland* has not been met.[6]

4. Finally, we reject Navarrete's claim that the trial court committed reversible error by allowing ADA Jackson, who participated as co-counsel for the State in the new trial hearing, to testify in violation of the rule of sequestration. After a proffer, the court allowed Jackson to testify to impeach the testimony of Sergeant Pruitt. A violation of the rule of sequestration generally does not affect the admissibility of the testimony, but may impact on the credibility of the offending witness. *Rakestrau v. State,* 278 Ga. 872 (4) (608 SE2d 216) (2005). We find no abuse of discretion in the trial court's ruling especially in light of the fact that this was a non-jury matter. Id.

Judgment affirmed. All the Justices concur.

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[6] In addition, Navarrete's unsubstantiated claim that trial counsel was ill-prepared is belied by the evidence and by counsel's submitted time records documenting his pretrial preparation.

IN THE SUPERIOR COURT
OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
V.	*	**CASE NO.**
	*	**SU-04-CR-566**
MARIO NAVARRETE,	*	
Defendant.	*	

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

(Filed Jan. 5, 2007)

1.

Defendant was tried in the Superior Court of Muscogee County, Georgia on January 23rd-27th, 2006 before the Honorable William J. Smith. Defendant was convicted by jury verdict of the following charges: Felony Murder, Aggravated Assault, Possession of a Knife During the Commission of a Crime and Concealing the Death of Another. Defendant filed a Motion for New Trial February 7, 2006 and an Amended Motion for New Trial on November 21, 2006.

2.

Defendant's Motion For New Trial was called for a hearing on December 19th, 2006 before Honorable William J. Smith. Defendant was present along with defense counsel Greg Coleman and Ed Dawson. After

a hearing, with evidence having been presented and considered in the matter, the Court now denies Defendant's Motion for New Trial on each and every ground.

SO ORDERED, this 4th day of January, 2007.

/s/ William J. Smith
Judge William J. Smith
Muscogee County Superior Court
Chattahoochee Judicial Circuit

PREPARED BY:

/s/ Stacey S. Jackson
Stacey S. Jackson
Assistant District Attorney
State Bar #387655

SUPREME COURT OF GEORGIA

Case No. S07A1456 Atlanta, February 25, 2008

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MARIO NAVARRETE v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Therese S. Barnes, Clerk

IN THE SUPERIOR COURT
OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA vs. **MARIO NAVARRETTE,** Defendant.	Case No. SU04CR-566

HEARING: Motion for New Trial

Transcript of the proceedings heard in the above-styled matter before **THE HONORABLE WILLIAM J. SMITH**, Senior Judge, commencing at. 9:00 a.m., December 19, 2006, at The Government Center, Columbus, Georgia.

The Honorable Erin Fourcade, Deputy Clerk

* * *

[16] but if we're going into factual circumstances, I think they need to be sequestered.

THE COURT: All right. The Rule of Sequestration is invoked. Anyone who's been subpoenaed to testify or asked to testify should step outside and remain within the call of the bailiff.

[*WITNESSES WITHDRAW FROM COURTROOM.*]

MR. JACKSON: And I apologize, Mr. Dawson. I should've done that at the beginning but I didn't want to interrupt.

THE COURT: Okay. Very well.

MR. DAWSON: Thank you. Georgia law does not permit a person to be guilty as a party to a crime merely by association with the guilty or presence at the time of the crime. And there was no direct evidence that Navarrette was a party to the aggravated assault rather than simply being present when it occurred. Without Medic Wulff's hearsay testimony, there would not have even been circumstantial evidence of that. Even if that circumstantial evidence is not excluded, it fails to eliminate reasonable alternatives.

And, finally, there was substantial direct evidence that Navarrette actually tried to

* * *

[21] you. Patients can also develop something called hand-foot syndrome, which is a toxicity that is unique to Five FU chemotherapy; and that toxicity involves the peeling and burning of the hands and can lead to actually the full peeling of the skin off the hands and feet, and that can happen periodically.

BY MR. DAWSON:

Q. Thank you. Did you observe that the treatment you gave to Dr. Wright – Mr. Wright had effects on him?

A. It did.

Q. Can you tell us what they were?

A. Yes. May refer to my record?

Q. Yes.

A. Early into his treatment, he developed a very unusual kind of pustular rash over his entire body actually. He developed a rash over his genitals, his torso, his arms; and it was a kind of rash that I had not really typically encountered with this kind of chemotherapy. It looked a lot like just bad acne. It was pustular. It probably had to do with some of the steroids he was getting, which are given to prevent nausea. That waxed and waned.

About his sixth cycle in November, mid-November, he began to develop some numbness in his fingertips that would last about three to four days. And then in December, late [22] December and January, he had some significant hand-foot Syndrome, meaning that his – the skin on his hands and feet literally began to peel off, and it was – I would classify it as a grade 3 or a grade 4 toxicity.

What does that mean? It means that when you have a grade 3 or grade 4 toxicity, it impairs your ability to perform your – what we call daily activities: eating, combing, brushing, those sort of things.

Q. And in addition to the physical impairments that you described and the fatigue that you mentioned, is it also possible for undergoing chemotherapy to impair mental function?

A. It is. And I didn't – its difficult to assess that and quantitate that, but it is very common. It's

clearly reported in the medical literature that patients undergoing chemotherapy lack the ability to concentrate. They lack the ability to focus. It's typically more noticeable in patients who have cognitive professions: teachers, lawyers, engineers, who use their – who function mentally and largely in a mental capacity. And it happens while patients are receiving chemotherapy and also for several months thereafter.

Q. Thank you very much, Doctor.

MR. DAWSON: Pass the witness.

CROSS-EXAMINATION BY MR. JACKSON:

Q. Good morning, Dr. Pippas.

* * *

[24] **A.** Yes, sir.

Q. Okay. But nothing of note in January of this year. Correct?

A. May I review my record?

Q. Sure.

A. Thank you. I don't have anything in my record that indicated he was having problems thinking. I do have much in my record indicating problems with hand-foot syndrome and neuropathy.

Q. Okay. Thank you. Thank you, Doctor. And as you know, you're here in reference – as we've talked and I'm sure you've talked to Mr. Wright and possibly defense counsel – we're here on a motion for new trial

about a case that Mr. Wright tried back in January of this year. Correct? You're familiar with that somewhat?

A. I'm very minimally familiar with that.

Q. Okay. And if – believing it was – taking my word for it that some type of motion, amended motion for new trial, was filed in November –

A. Okay.

Q. – 2006, taking that to be true, this in your records Mr. Wright mentioning about mental incapacity was September of 2006 would be just a couple of months before, if taking what I say was true about the motion being filed in November of 2006?

A. That's correct.

* * *

[39] occurs as a result of the chemotherapy treatment, is this more likely to occur at the time of the chemotherapy treatment or shortly after or a period of months or years after that?

THE WITNESS: It can occur in and around the time you take your chemotherapy. So for those few days thereafter, universally people become fatigued. Don't want to work. Can't focus on work. That period of what I would call immediate chemotherapy fatigue lasts anywhere from two to four days after you've finished taking your treatments. That's one. And then patients recover from that and feel like they can go back to work; they can focus.

In addition to that, however, there is clearly at the end of a series of chemotherapy treatments, be that six treatments or 12 treatments or eight, whatever that number is, at the end of that series of treatments and for a period thereafter that may last for a year or two or may – there are – there's something called chemotherapy brain or chemobrain that we talk about in the profession that has been supported in the literature that is a late effect of treatment that again is a – is a – it's a loss of what I would

* * *

[42] **THE WITNESS:** '04. It would've been '04.

BY MR. DAWSON:

Q. Okay. And how did you get Mario Navarrette's case?

A. I was appointed.

Q. Okay. And when did you become ill with cancer?

A. I was diagnosed, I believe, around July of last year.

Q. Are you still being treated for cancer now?

A. No.

Q. When did the treatments stop?

A. The last treatment was, as I recall, February of last year. No, February of this year.

Q. February of '06?

A. Uh-huh.

Q. Did your illness and your treatment affect your performance during Mario Navarrette's trial?

A. Yes, it did.

Q. How did it affect you?

A. Well, I had a problem with short-term memory. I had a problem concentrating. I recall not being able to read my own notes. Counsel for one of the other defendants made a remark once he –

MR. JACKSON: Object, Your Honor, hearsay.

THE COURT: No response, the objection [43] is sustained.

Do you want to pull that a little closer to you.

THE WITNESS: And that – but I had trouble concentrating. Trouble reading my own notes, and Mario told me about the witnesses after Wulff had testified that Pruitt and Rodriguez were there on the hill when Davis cut his own hand and I intended to call those witnesses. And why I didn't, I don't know.

BY MR. DAWSON:

Q. Do you remember when Mario first told you that Pruitt and Rodriguez had been there the night in Iraq when Davis was assaulted?

A. I looked back and saw some notes where he had told me that, and they looked like it was at the jail in an interview, and he said that they would be character witnesses. And then I do recall during the course of trial he indicated to me that they were there when Davis cut his hand and they could testify to that.

Q. Did you investigate Pruitt and Rodriguez's stories?

A. No, I did not.

Q. Did you call Pruitt and Rodriguez at Mario's trial?

A. No, I did not.

Q. What was your reason for not speaking to, not calling [44] Pruitt and Rodriguez?

A. I have no explanation.

Q. Was it a strategic decision?

A. No, it wasn't. I had intended to call those witnesses and I just didn't do it.

Q. Can you describe the symptoms you were experiencing during the course of the trial?

THE COURT: The what?

BY MR. DAWSON:

Q. The symptoms, medical symptoms.

A. Well, physically, my hands had burst open. I had bandages on my fingers. Of course, I had trouble concentrating. I had trouble actually following all the evidence, and I was in very severe back pain. I was just not myself.

Q. In comparison to other times during the course of your chemotherapy treatment, was the way you were feeling during Navarrette's trial worse or better than earlier in the treatment?

A. Well, I was told to expect certain things from those treatments. What I didn't realize was that things could get progressively worse. As an example, I had a trial in November of the following year [*sic*], and I didn't have that problem at all; but by the time this trial came along – and, of course, I mentioned to Dr. Pippas that I needed to bring my A game to [45] this trial because it was that important, but he didn't, you know, really make any comment on that, but I just wanted to know whether or not I could, perhaps, maybe perform, but I guess maybe he really couldn't tell me that.

THE COURT: I'm sorry. I'm having a little trouble hearing you. Would you speak up. Did you say you asked Dr. Pippas if you should – you would be able to perform in this trial?

THE WITNESS: No, I didn't ask him that. I just –

THE COURT: Pull that a little closer to you.

THE WITNESS: I just made the statement that I needed to have my A game for the trial.

BY MR. DAWSON:

Q. Do you feel like you did have your A game during Mario Navarrette's trial?

A. No, and the next time I saw Dr. Pippas, I told him that I had a D game. I just did not perform like I know I could have at that trial. I've, you know, tried many, many cases; and I just know when I'm performing to the level that I know I can perform. And in this particular instance, I know I wasn't.

Q. Thank you, Mr. Wright.

* * *

[74] court says I did. Now, but it also says that I could do this and have this removed. And, yeah, that's my signature and I was considering doing that.

Q. All right.

MR. CONGER: Your Honor, we move to admit State's Exhibits 1, 2 and 3. On 3, could I get a copy of this one.

THE COURT: And substitute a copy?

MR. CONGER: Yes, sir. Any objections?

THE COURT: Objection to relevancy again on that?

MR. COLEMAN: Same objection, Your Honor.

THE COURT: Subject to that, it's admitted, and you may substitute a copy of it.

MR. CONGER: Yes, sir. Thank you very much, Your Honor.

[*STATE'S EXHIBIT 3 IS ADMITTED INTO EVIDENCE.*]

MR. CONGER: That's all we have on cross at this time, Your Honor. Thank you.

THE COURT: Any redirect?

REDIRECT EXAMINATION BY MR. DAWSON:

Q. Mr. Wright, have you ever testified to being ineffective as counsel other than in the Hodnett case –

[75] **A.** Never.

Q. – and this case? And the Hodnett case was when?

A. '97.

Q. In the Hodnett case, did you fail to investigate and call crucial witnesses?

A. No, not that I recall.

Q. Can you read for us what it says at Page 11, lines 14 to 18?

A. "Did you investigate any of the alibi witnesses that he said that he had?"

Answer: "I did."

Question: "You did talk to them?"

"Uh-huh."

Q. Thank you. And in the Georgia Supreme Court opinion in the case it said, "Counsel personally interviewed the many witnesses called and filed numerous pretrial motions on behalf of Hodnett. Additionally, counsel worked closely with the investigator assigned to the case." Did you personally interview Pruitt and Rodriguez?

A. No.

Q. Was your decision not to interview Pruitt and Rodriguez a strategic decision?

A. I intended to.

Q. During the Hodnett trial were you sick with cancer?

A. No.

[76] Q. Were you undergoing chemotherapy at that time?

A. No.

Q. Did Navarrette tell you prior to his trial that Pruitt and Rodriguez were with him on the hill on the night in Iraq when Davis was assaulted?

A. He may have. You know, we talked quite a bit, but I'm certain he told me that during the course of his trial.

Q. So you're not certain whether he told you before trial, but he may have?

A. May have.

Q. Did he tell you during the trial?

A. He did.

Q. And when was that?

A. It was after Wulff had testified, I believe, because he was indicating something other than what he knew about the facts of him getting his hand cut.

Q. And when he told you that, did you call Pruitt or Rodriguez to testify?

A. No, I didn't.

Q. Was that a strategic decision?

A. I'm sorry.

Q. Was tat [sic] a strategic decision?

A. No, it wasn't.

Q. Between the November trial in which you won an acquittal, November of '05, and January of '06, when Mario [77] Navarrette's trial was, how did you [sic] condition change mentally and physically?

A. Well, it got progressively worse, and in November I'd only had a few treatments at that point, maybe three. I hadn't – I didn't exhibit the kind of symptoms and the effect that it had on me as these treatments progressed. You know, as an example, during the trial in January, I didn't have – I still had feelings in my hands and feet. Now I don't, you know. So what I'm saying is it appears that as these treatments progress and I guess more and more of the stuff gets to build up in your system, it starts to affect you differently. In November I didn't have those symptoms. I didn't have any cuts on the hands. I was feeling fine. I wasn't tired. I didn't have to go home and lie down in the middle of the day. I was doing fine.

But in January, I'm afraid it was altogether different, although I thought I was doing okay.

Q. But during the trial, did Mario tell you about Pruitt and Rodriguez?

A. He did.

Q. And you decided not to call them?

A. I intended to.

Q. And that was not a strategic decision?

A. I think I just forgot.

Q. Thank you.

* * *

[83] **AFTERNOON PROCEEDINGS**

THE COURT: All right. You have another witness.

MR. COLEMAN: One more witness, Your Honor. We'd like to call Sergeant Gregory Pruitt. Whereupon,

GREGORY DWAINE PRUITT

is called as a witness and, having been first duly sworn, is examined and testifies as follows:

DIRECT EXAMINATION BY MR. COLEMAN:

Q. Sergeant Pruitt, would you state for the record your name.

A. Gregory Dwaine Pruitt.

Q. And you are serving in the military?

A. Yes.

Q. What is your position in the military?

A. I'm a squad leader.

Q. How long have you been in the army?

A. Five years.

Q. Can you tell me where you have served in the military?

A. Fort Benning, Kelly Hill, and we've been deployed to Iraq. This is my third time in Iraq.

Q. Do you know Mario Navarrette?

A. Yes.

[84] Q. Do you recognize him here today?

A. Yes.

Q. How do you know Mr. Navarrette?

A. He was in my same platoon in my company.

Q. And can you tell us when that was?

A. That was – he got there in 2002 when we were deployed to Kuwait.

Q. Did you meet him before you went to Kuwait, or did you meet him in Kuwait?

A. In Kuwait.

Q. And after Kuwait, then you went into Iraq?

A. Yes.

Q. And you were in Iraq together?

A. Yes.

Q. Do you feel that you know Mr. Navarrette pretty well?

A. Yes.

Q. How do you find him – how did you find him to be as a soldier?

A. He was a good soldier.

Q. And as a person?

A. He was a good person, good father. He always talked about his kids and being in the military.

Q. If you had been called upon to give testimony relating to Mr. Navarrette's character or propensity for violence or anything else, would you have been willing to give [85] testimony?

A. Yes.

Q. Were you called to give testimony at trial?

A. I was at first.

Q. Were you ever called to the witness stand?

A. No, not to the witness stand.

Q. If you had been called to give testimony about Mr. Navarrette's character or propensity to violence, can you just very briefly summarize what the nature of that testimony would've been.

A. He was a great soldier and he was good –

THE COURT: All he would've been able to testify to was his character good; he'd believe him under oath. I don't think he'd've been able to elaborate on it.

MR. JACKSON: Your Honor, I believe the only question that Mr. Wright would've been asking –

THE COURT: I assume his character. I don't know about the other issues.

MR. JACKSON: Specific bad acts.

MR. COLEMAN: If Mr. Jackson will allow me to proceed, I believe I'll be answering those questions.

THE COURT: All right.

[86] **BY MR. COLEMAN:**

Q. Did you know Mr. Davis?

A. Yes, sir.

Q. How did you know Mr. Davis?

A. He was also in my platoon.

Q. Did you feel like you knew Mr. Davis reasonably well?

A. Well, not really, I mean, he was a loner. He was in my squad. I mean, I knew him as far as when we were at war together.

Q. Okay. If there had been any trouble between Mr. Navarrette and Mr. Davis would you have likely known about it?

A. I would've known about it.

Q. Did you know about any?

A. No, not at all.

Q. Did you know the other defendants in this case, Mr. Woodcoff, Burgoyne, Martinez?

A. Yes.

Q. You knew all of them?

A. Yes.

Q. And how did you know all of them?

A. They were all in my platoon.

Q. And you served with them for some period of time?

A. Yes.

Q. During the time you were in Iraq?

A. During the RF One.

[87] Q. You met earlier today in the hall with Mr. Wright.

A. Yes.

Q. Now, before today have you ever met him?

A. No.

Q. Did you ever talk to him?

A. No.

Q. Not in person, not on the phone?

A. Not at all.

Q. Never contacted by him?

A. Never.

Q. I'd like to visit with you very briefly about an incident that happened in Iraq. I don't want to summarize a lot of trial testimony, but there was

testimony about a night on a hill. Are you familiar with what I'm talking about?

A. Yes.

Q. Do you remember when that was?

A. I can't recall the exact date.

Q. Were you there?

A. Yes, I was there.

Q. Were people drinking?

A. Yes.

Q. Were you drinking?

A. Yes.

Q. During that period of time, did one of the people there suggest doing a blood-brothers ritual?

[88] **A.** Yes, it was Specialist Davis.

Q. Mr. Davis suggested this?

A. Yeah, Mr. Davis. Yes.

Q. Okay. And that's where you cut your hand and mix your blood together and then shake or something like that?

A. Yes.

Q. Did you do that?

A. Yes, I did.

Q. Did Mr. Davis?

A. Yes.

Q. Did Mr. Navarrette?

A. Yes.

Q. Mr. Navarrette was there?

A. Yes.

Q. Did – who cut Mr. Davis's hand?

A. He cut his own hand.

Q. You're sure about that?

A. Positive.

Q. Let me ask you, was there any trouble on the hill that night?

A. Yes. Martinez had got into a altercation with Mr. Davis.

Q. It was Mr. Martinez?

A. Yes.

Q. Was Mr. Navarrette involved in that altercation?

[89] **A.** The only involvement he had was trying to break it up.

Q. So Mr. Navarrette was there and he tried to stop it?

A. Yes.

Q. He didn't hit Davis?

A. No.

Q. You saw that?

A. I saw that.

Q. With your own eyes?

A. Yes.

Q. Was Medic Wulff on the hill that night?

A. No.

Q. Did he see a blood-brothers ritual?

A. No.

Q. Did he see anything else related, anything that happened on that hill?

A. No.

Q. After Mr. Davis was killed and charges were brought against Mr. Martinez and Mr. Navarrette and others, you've testified that Mr. Wright did not contact you at all.

A. At all.

Q. Did the prosecution contact you?

A. Yes.

Q. And did they speak to you at some length?

A. Yes.

[90] Q. And did they actually call you up here to possibly testify at trial?

A. Yes.

Q. And if they had been interested in having somebody who was on the hill testify about what happened on the hill, would you have been willing to tell the Court and the jury at that time what happened on the hill?

A. Yes.

Q. And would you have told them that Mr. Navarrette attempted to stop an altercation between or some movement by Mr. Martinez against Mr. Davis?

A. Yes.

Q. You saw and heard everything that happened on the hill that night?

A. Yes.

Q. And nothing was – you were here in this courthouse and could've testified about what you saw and heard. Is that right?

A. Yes.

Q. But you were not asked to come into this courtroom and give that testimony.

A. Correct.

Q. And you don't know why.

A. I don't know why.

Q. Did you – you knew about the murder after the time it [91] came out. Right?

A. Yes.

Q. And you had your own memories of what had happened on the hill. Did you think there was any connection at the time between what happened on the hill and what happened outside Fort Benning?

A. No.

Q. But if somebody had asked you about it, you would've baldly have explained it?

A. Correct.

Q. And you would've testified.

A. Yes.

Q. The day that you came and were waiting to possibly testify, do you recall what day of the trial that was?

A. I think it was like the first day of the trial.

Q. Okay. You were in the waiting room?

A. Yes.

Q. Do you recall who else was there?

A. It was me, Sergeant Delisie. It was my platoon sergeant at the time, he's First Sergeant Colter; and Davis's parents.

Q. So Mr. Davis, the father, was in the witness room that day?

A. Yes.

MR. COLEMAN: Pass the witness.

* * *

IN THE SUPERIOR COURT
OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA vs. **ALBERTO MARTINEZ and MARIO NAVARRETE,** Defendants.	Case No. SU04CR-566 **VOLUME 2**

VOLUME 2 of Five Volumes

Transcript of the proceedings heard in the above-styled matter before **THE HONORABLE WILLIAM J. SMITH,** Senior Judge, and a jury, commencing at 9:00 a.m., January 24, 2006, at The Government Center, Columbus, Georgia.

The Honorable Stephanie Liston, Deputy Clerk Superior Court Of Muscogee County

* * *

[142] **PROCEEDINGS**

[*9:00 a.m., Tuesday, January 24, 2006*]

THE COURT: Are the jurors here?

DEPUTY SPIVEY: The jurors just got here, Your Honor.

THE COURT: Very good. Is there anything before we bring the jury in?

MR. WADKINS: No, sir, not from us.

THE COURT: When they come out, just have them remain seated and come to order.

MR. JACKSON: Your Honor, there may be one issue.

THE COURT: All right.

MR. JACKSON: Judge, on yesterday, during my opening, I believe Attorney Wadkins had the objection concerning the comment made with respect to testimony from Medic Edward Wulff on the hearsay objection. He would be the first witness by the State.

THE COURT: Oh, well, y'all want to address that then.

MR. JACKSON: I know the Court wanted to address it.

THE COURT: Go in, if you would, and let the jury know that we're working, but we're taking [143] up a matter of law. So have them just make themselves as comfortable as they can back there and we'll be with them shortly.

DEPUTY SPIVEY: All right, sir.

MR. CONGER: Your Honor, we told the Court up at the bench yesterday what we expected to prove. But the gist of it is that on the night of – a night in June or July of '03 in Kuwait, after they'd returned – the soldiers had returned from Iraq, Specialist Edward Wulff, a medic attached to the company and the platoon that –

THE COURT: Medic, did you say?

MR. CONGER: Medic, yes, sir – that all these people were in will testify that he was a good friend of Specialist Richard Davis; that he was basically Davis's only friend over there; that they talked regularly; that he was Davis's best friend and had known him for six months since they'd been in Kuwait and Iraq and knew him throughout the whole time the soldiers were in Iraq. And during that time they had established a relationship. They would talk to each other regularly, tell each other important matters. We expect the evidence to show that Davis placed a lot of faith in Wulff – W-U-L-F-F is his name – [144] and confide in him. And then on – we expect on a date we believe in June of '03, could've been July, before the troops came home, the – just like Mr. Jackson said in his opening statement, the victim – they were over there. It was after midnight and Wulff was asleep and he was awakened by Davis. And Davis told him that he had been – that he needed some help for a cut he had on his hand and that Wulff looked at it and he had a nice – a neat cut several centimeters long on his hand. So Wulff treated –

THE COURT: So Wulff is a medic, not a doctor. Is that correct?

MR. CONGER: Yes, sir. Wulff's a medic, an enlisted person.

THE COURT: All right. Excuse me.

MR. CONGER: And he treated the wound. He did the treatment he described that, tried to close it up. He said that Davis had been drinking and that he asked Davis what happened to him and that Davis made the statement that he was playing a game called "Blood Brothers" with Navarrette and Martinez and that he got cut in the process and that Navarrette and Davis [sic] had choked him and

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[153] it's denying us the right to confront the witness against us. Of course, Davis is dead; however, I think there's another prong that they have omitted from the this. My reading of the necessity clause is that they have to, one, show the witness is unavailable, which they say he's dead and, therefore, is unavailable in this case. But they also have to show, I believe, that there's no comparable evidence available to the proponent. And the comparable evidence in this case, we would say there were other people that were there. In his statements, as I've read them, Mr. Wulff is going to say, or I would expect him to say, that there were up on the hill and they were drinking. So the person that should be coming to court is someone who had a firsthand, eyewitness account of what happened there, not Mr. Wulff, who's being told something later on after he's been woken up from his sleep.

Also, they're correct. They have to show some kind of circumstantial guarantees of trustworthiness.

THE COURT: Let me go back and have you elaborate somewhat more on what you've referred to as "no comparable evidence." There were, quote, [154] "people on the hill and they were drinking." Would be a little more – elaborate a little more on that. I don't understand what you're –

MR. FLOURNOY: Well, that's something we may need to voir-dire this witness before you rule on this, because that's simply what he said in his statement. We don't know who those people are.

THE COURT: "People on the hill," I don't -

MR. FLOURNOY: Where it occurs is in Iraq on a hill supposedly, according to what Davis told Wulff, is that there were some people up on the hill and he claims that my client and Mr. Navarrette did some kind of blood-brother thing. Then they beat him and choked him and – but then he went and got treatment. But we don't know who these other people are or whatever. Mr. Wulff does; and if they're people that were in the unit or whatever, then they're people that the district attorney could've subpoenaed to be here, or investigated and had those people who had a firsthand account of what happened come into court and testify about it.

We're having basically a hearsay problem. We can't confront Davis about the circumstances. All we're doing is confronting a statement he gave

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[156] **MR. FLOURNOY:** Well, we would contend that there were other people on the hill and that they would've been in the best position. And it's not our job to bring them to court. That's the DA's job to bring those people to court; and if they're the ones who actually witnessed it, that's the person who should be testifying, not somebody who was woken up in their sleep and told a story that they didn't witness firsthand.

But, also, regarding the circumstantial guarantees of trustworthiness, there are several factors that courts have looked at. One of them is the motive to lie or mislead. And in this case, we would contend that Davis may have been in some kind of blood-brother ritual and he cut his own hand and had to explain to the medic how he got this cut. Instead of taking credit for it, he blamed some other people for it. So he had a motive, reason to lie, so he wouldn't get in trouble.

Also, another indication that the declarant may not have been telling the truth and may not have been telling the story correctly is whether or not he was under the influence. And in this case Wulff is going to say that Davis – or

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[177] **A.** Yes.

Q. All right. And – okay. What did you do when you saw this?

A. I cleaned it out the way it would be cleaned out normally, and I closed it with Steristrips and just

asked him how it happened. And he told me he was going to be blood brothers and –

Q. Let me ask you something. Had he been drinking at this time?

A. Yes, he was.

Q. All right. Now, tell us what happened, what he stated to you, please, sir.

A. Excuse me.

Q. Tell us what he stated to you, please.

A. He said that he was up on the hill drinking with Martinez and Navarrette, and they were just hanging out drinking and said they wanted to become blood brothers. And he stated that they had hit him and they had choked him. And I think he said, you know, he was pretty – you know, he was feared, you know. He had a lot of fear. So I just told him, you know, "You guys were just drunk, you know. Things happen when you're drunk."

And he said that he felt like, you know, that they were going to kill him. And I was like, "Don't

* * *

[179] Q. And you said that he said, Davis said he was afraid they would kill him?

A. Yes, sir.

Q. All right, sir. And you tried to make him feel better and told him that it was just –

MR. WADKINS: Your Honor, I'm going to object to the leading.

MR. CONGER: All right. I won't.

BY MR. CONGER:

Q. What did you tell him?

A. I just reassured him and let him know that it was just the alcohol and I'm sure it was nothing serious.

Q. All right. Now, did you report this to anybody else in the United States Army over there?

A. No, I did not, sir.

Q. Why not?

A. Because that's a violation of the patient-privacy act of 1974.

Q. All right. Did you ask Davis to report it or if he was going to report it?

A. I told him to report it, but he just told me that all he would say was he was sliding down the hill and he got his hand caught in a thorn bush.

Q. He said what?

* * *

[214] **A.** I had proceeded to get out of the front seat and I believe everybody else got out at the same time. And I heard an argument and some people were

arguing in Spanish. I assume Martinez and Navarrette, and then I proceeded to walk off into the wood line.

Q. All right. You heard some argument in Spanish and you said –

A. Yes, sir.

Q. – some people were arguing. Was there any English being spoken?

A. No, sir, not that I heard.

Q. All right. Do you know what each individual person was doing besides yourself? Do you know what anybody – do you know what Davis was doing –

A. No, sir.

Q. – at that point?

A. No, sir.

Q. How about Navarrette and Martinez?

A. No, sir.

Q. How about Burgoyne?

A. No, sir.

Q. Now, what did you do?

A. I went over – I walked off into the woods. The car ride had made me pretty queasy. I went over to vomit.

* * *

[264] and then I hit him again. At this point he wasn't fighting me, and I took as, you know, truce or walking way. At that point I didn't hit him, and he started walking towards Martinez and Navarrette's area, and that's when he got stabbed in the side by Martinez.

Q. Now, how did – describe to the jury how that happened, as you say, Martinez stabbed him in the side.

A. Well, Martinez stabbed him in the side. Well, when Davis was walking this way, Martinez came across right-handed and hit him in his left side, right here, where the lung's at, and that's where he hit him. And when he hit him, he fell.

Q. Who fell?

A. Davis.

Q. Fell to the ground?

A. Yes, sir.

Q. And after Davis fell to the ground, what happened next?

A. Martinez – or Navarrette intervened said, "No, no, no, you can't do this."

Q. Try to keep your voice up a little bit, if you can.

A. Yes, sir. He said – Navarrette said he couldn't, tried to intervene. And at this point I saw

[265] when Davis fell, and Navarrette was talking to Martinez saying, "You can't do it. You can't do it."

And I said – I was looking at Davis when I saw him. I saw frothy blood. I saw his shirt torn a little with a hole inside and there was some blood on it. And I looked at Martinez and I knew, you know, he just had – he had that knife in his hand, and I looked at him. I was afraid at first because I didn't know what was going on. And I knew – I noticed once he hit the ground and seen that knife, you know, he was meaning business, more than what I wanted, but I seen the blood in his eyes and knew –

Q. Did Martinez say anything at that point?

A. No, sir. He was just – at that point, that was real quick. He just stuck him but didn't say nothing at that point. But when we started – when Navarrette intervened, he started saying, you know, "He's going to tell. He's going to tell, you know. I got kids. He's going to tell on me. He's going to tell." He kind of like was trying to –

Q. Who said "He's going to tell"? Who's making those statements?

A. Martinez.

Q. Martinez, okay.

[266] **A.** I didn't quite know what he was trying to say at that point or what he was meaning by "he was going to tell," and there was some kind of confusion going on because he had nothing to do with what

I was doing with Davis, nothing at all. And he came out of nowhere and hit him with the knife, you know. He didn't say nothing in the car or nothing. He just came out and just stuck him like –

Q. Now, at that point, you say Navarrette tried to intervene and said something to him. Did you try to –

A. Yeah, I was –

Q. – say something to Martinez about what he was doing at that point?

A. I was telling him, I said – well, at that point I was kind of, you know, looking over Davis and looking at, you know, Martinez and Navarrette. Navarrette was – kind of had things under control, but I kept my distance from where I was at about three feet away, three or four feet away. And I was looking at Davis, but I was saying to him at that point, you know, we started discussing it, like, "You don't have to do this. You got kids," you know, and "We can leave him here or we can give him medical attention but we don't have to kill him over something like this," you know. It was something small, something simple, you know. He didn't need to get [267] stabbed over, you know. I started to come up with any excuse that we could, even to leave him there if we had to, you know what I'm saying, so he wouldn't stab him any more, you know. But it started escalating. He just – he had it in his eyes. He was going – determined to do it. And, you know and –

Q. Did you or Navarrette at some point in time stand in – if Davis is here, did you or Navarrette at some point in time stand in between Davis and Martinez while Martinez had the knife in his hand after Davis was first stabbed?

A. Yeah, Martinez had the knife and Navarrette was next to him and I was kind of like in the front of, you now – kind of back in front of – like, Navarrette was on the left of me and Martinez was here. I was kind of like right behind Navarrette to the right looking at Martinez. But we intervened for just about – a short amount of time, until about – you know – I can't guess, like five minutes, if that. Five or 10 minutes maybe. It's hard to tell the time. You know, I wasn't really worried about the time, but it was about around that range. And it got to a point where I started getting real frustrated and he wasn't letting go of the knife. He wouldn't let go one bit.

Q. Did anybody else have a knife in their hands?

[268] **A.** No, sir.

Q. Martinez was the only one?

A. Yes, sir, at that time.

Q. Now, you're – you say you and Navarrette are pleading with him at that point?

A. Yes, we pleaded with him.

Q. What happened next?

A. Me, I got angry and I stepped away and I made a choice. I left him there. I dishonored him. I left him and walked away. And I said to Navarrette, you know, "It's no use. He's got to do what he's got to do," and I walked away and went back to the car.

Q. And at that point when you walked away and went over the car and kind of left the situation, what did Navarrette do at that time?

A. Well, he –

Q. Did he walk away as well?

A. Yeah. I went first but he kind of followed suit. He followed suit and we went back to the car and that's where we stood.

Q. And when you and Navarrette stood by the car and walked away, what did Martinez do at that time?

A. No later than two seconds later, he was on him. He stabbed him first somewhere in the upper abdomen, lower chest area; and as soon as he stabbed him, Davis

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[302] And from there, we started throwing blows again and then out of nowhere, Martinez comes out and just hits him in the side with his knife.

And, of course, I didn't know or nobody else knew he had a knife until I saw Navarrette trying to stop him for some reason, and I saw Davis laying on the

ground. You know, he had – I was trying to examine him. I looked down at him and he was laying on the ground like he'd been hit really hard in the stomach, but I wasn't sure. And Navarrette was over there trying to calm him down, and then I realized – I looked at his right hand and he had a knife in his hand and he was acting like, you know, if Navarrette wasn't there, he was acting like he was going to keep going, you know. But I saw blood in his eyes. I saw what he was doing, and it kind of scared me. It scared everybody there.

So Navarrette and me walked over to him. I didn't get too close to him. Navarrette was with him, said some stuff in Spanish, that's all I know, there. And then he said something about his kid, yelled out, Martinez did, you know, "I got a kid. I got a kid," you know. And from there, you know, I kind of saw where he was coming from. But

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[314] Q. You said he hit one of the dancers in the face with a quarter?

A. Oh, no, that was before. We – that was like about a year before. That was before we went to Iraq.

Q. How long had y'all been back in the States when this thing happened?

A. About four days.

Q. So this happened prior to y'all going on your two- or three-week leave?

A. Roger that, sir. About three or four days, three.

QUESTIONS BY DETECTIVE CULBERSON:

Q. You mentioned that Navarrette tried to make some attempt to keep Martinez from stabbing or doing any more to Davis?

A. Yes, sir.

Q. And you mentioned that Woodcoff just stood there?

A. Roger that, sir. He was just off – you know, standing there.

Q. He never moved? He just stood there the whole time?

A. Roger. Me and Navarrette actually were the only ones trying to keep him from doing what he

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[371] – you know, you kind of see. I didn't see Woodcoff but I, could kind of see Martinez and Navarrette there, and Woodcoff was kind of over to the right here.

Q. Right. You got out on one side of the automobile and they got out on the other side of the automobile. Is that right?

A. Yes, sir.

Q. So there could've been some things going on over there that you didn't see?

A. Yes, sir.

Q. Okay. Now, y'all had a discussion about this thing. Did Navarrette tell you that he did get a knife from him?

A. Navarrette, yeah, we had a discussion. He did tell me he got a knife from him.

Q. And then y'all talked about how maybe he got another knife.

A. Yeah, he might've got another knife. He said that – Martinez said that, verbally, he said that to me in the car when we drove back that next day looking – smelled the aroma of the body, he said that the knife was given to him by Woodcoff, that the knife was given to him.

Q. That Woodcoff gave him the knife?

A. Yeah, that's what he said.

[372] Q. Okay. Now, while you and Davis were having altercations, I believe your testimony is that that's when out of nowhere Martinez comes and stabs him in the side?

A. Yes, sir.

Q. And what did you do at that point?

A. At that point when he stabbed him in the side, he fell and right then Navarrette went to talk to him and I kind of stepped in between Davis and Martinez and was just talking.

Q. Okay. And then you both at that point tried to stop Martinez from doing any further harm?

A. Yes, sir.

Q. And, in fact, even tried to talk Martinez into taking Davis to the hospital. Is that right?

A. Yes, sir.

Q. And Navarrette was involved in trying to get him to do that?

A. Yes, sir.

Q. Of course, now, y'all didn't have any cell phones or anything out there, did you?

A. No, sir. I don't know if the other guys had the other cell phones. I didn't have a cell phone on me.

* * *

[384] **THE COURT:** Mr. Wright, would you be more comfortable seated? I will allow you to ask questions seated, given the circumstances, if you wish.

MR. WRIGHT: Well, I appreciate that, Judge. I'll hang on for a minute.

BY MR. WRIGHT:

Q. But nobody helped him do that, did they?

A. Can you repeat that?

Q. Nobody helped him kill Davis.

A. No, sir.

Q. Okay. So it was your belief that because you were there and a murder was committed that you could've stopped from happening, although you tried, that you were just as guilty as the killer?

A. In my eyes –

Q. In your eyes.

A. – yes, sir. I killed him here, sir; I didn't kill him here [Gesturing]. You see. I'm not here to save myself. I put myself out here, and I'm not trying to lie. All I know is that if you're there and you see something like that happen, you're just as good as dead. You're just as guilty as anyone else there.

Q. That's in your mind?

A. In my mind, yes, sir.

* * *

[416] **A.** I was there but, I mean, I don't recall being in the ritual, you know, with the blood-brother thing with – I remember who it was about. It was about Davis and Navarrette. He says I was there, but I don't – I can't remember. You know what I'm saying? I can't remember if I was there or not to say that for a fact I was there, but I wasn't, you know. I can't even tell you. I can't remember that.

Q. You can't remember whether or not you were there or not?

A. Yeah, I mean, back in Alpha, back in there, you know, back in Iraq, I mean. I can't remember if I was there. I don't remember doing a blood ritual with Davis.

Q. And isn't it true that Navarrette asked you to help him stop Martinez from killing Davis?

A. Yes, sir.

Q. And also ask you to help him take him to the hospital as well?

A. Yes, sir.

MR. WRIGHT: That's all I have.

THE COURT: Very well. You may step down.

THE WITNESS: Yes, sir.

[WITNESS STEPS DOWN.]

* * *

[550] here to celebrate, and whatever your intentions, whatever you're planning to do is not going to happen. So please give me the knife."

Q. Okay. Were you at that point – well, what happened then, after you talked to him about that?

A. Well, I can see in his eyes that he – he was kind of upset, but he didn't really want to give me the knife. So I step – I took a step close to him and I extended my hand. He pulled his hand backwards, and I told him again. I repeated that he had a family;

that we don't need this right now; we don't need to get in trouble; that I'm going to let him do whatever he thinks he's going to do. And I extended my hand again, and that's when he – I met – as soon as I was going to grab his hand, he – I can see his hand moving forward slowly, and I got the knife from him.

Q. Okay. So, in fact, he did give you the knife.

A. Yes, he did.

Q. Okay. Then what did you do next?

A. After I took his knife away, I turn around. Burgoyne was sort of facing me, because when I turn around and followed Martinez to see where he was going, he was going back to the car, to the back of the car where Mr. Burgoyne, was standing. I didn't see at the time where Mr. Davis is. I see – I follow Martinez, and when he's coming past Burgoyne, I see Burgoyne. So I turn around and I'm

* * *

[555] **A.** But I did not see no knife.

Q. All right. What about Martinez?

A. Mr. Martinez, I could not see him because I was directly behind him, and I was leaning towards the window, but I had a clear shot at whatever Mr. Burgoyne was doing with his hands and knees.

Q. Okay. Now, when y'all left there – well, prior to going out there and the car stopped, was there any

conversation that you heard about anybody doing any harm to Mr. Davis?

A. The only thing I did hear was somebody asking the other person, "Where do you want to do it, homes?" That's the only thing I heard. I didn't say – didn't see who said it, and I didn't know what they were talking about.

Q. Okay. Now, you're in the car. On the way back was there any talk about burning Mr. Davis?

A. No, after everybody got in the car, nobody had a discussion about burning the body or anything like that. Everybody got in the car and we drove back. I'm assuming we were going back home, but then they stopped – they stopped in a gas station that was kind of on a hill, because I remember the car being slanted and the bright lights of the store hitting inside the car and Burgoyne getting off.

Q. Okay. Then Burgoyne got out and you don't know if he bought, what he bought or anything. Is that right?

* * *

[561] And I went back – stepped back next to a tree and I relieved myself, and I was just looking, seeing what he was doing.

Q. Okay. Was there any talk about you being a lookout?

A. No, there was no such thing about him telling me that for me to be a lookout or anything. None of that.

Q. Okay. Now, let me take you back now to when y'all were in Iraq, and I believe there's been testimony about taking a blood oath.

A. Yes. In Iraq one week when the war finished, we were held outside the international airport, probably like 10 miles away from the main entrance, and were in like in a hangar-type of warehouse where they put planes, because there was a runway there for little airplanes. And there was a hill next to that – we called it a hill. It was actually just a big sort of mountain type of terrain, but with a road all around. It was like an observation point. And next to it was a reserve unit. They were National Guard that were specialized in purifying the water for us to drink.

And one night we had – they were talking about getting some alcohol. Now, alcohol is illegal and is banned from Iraq. So we were actually not supposed to be drinking. But the National Guard people, they had some contacts that they can get alcohol. So we buy alcohol and we get [562] together, some of us. Myself, I remember we had two occasions that went to that hill and drank alcohol. One was during the day and one was during the night. And the first occasion, Mr. Martinez, myself, PFC Rodriguez, Sergeant Pruitt and that's about it – and Woodcoff were there. Now, we drank and we had a conversation.

Now, on the second time we went around, which was a night, Mr. Martinez wasn't there. Mr. Woodcoff wasn't there. That's when we made the blood oath. Mr. Burgoyne was there, Sergeant Pruitt, PFC Rodriguez and myself and Mr. Davis. Mr. Davis was sitting, the second time, was sitting in the middle. We were passing the bottle around. He would pass it to Burgoyne, Burgoyne would pass it to Pruitt, Pruitt to Rodriguez and Rodriguez to me and so forth. We were having a conversation and we come up – they had come up with this "Let's do a pact. Let's cut our hands and bleed and shake on it that we will take care of each other." So we did. And I cut my hand and Mr. PFC Rodriguez did his. Pruitt did his. Burgoyne did his. Davis, he was already had too much drink now. He was jugging that bottle. He wasn't sharing that much, but he cut his hand but did not cut it in the palm. He cut it on top and he made a big cut that he asked me, "Do you want me to cut you?"

I'm like, "No, no, I already cut myself."

* * *

[563] "Well, do you need blood?" and he grabbed my hand and put his hand on top of mine and did this motion, and I can feel all the blood. I'm like, "Man, you're bleeding too much."

And Rodriguez like, "What did you do?" And he looks at the cut and remarked, "Let's go." So we get up and we leave. I, on the way back to where everybody was living at, I passed out behind a track, which Mr. Burgoyne already specified is a tank. Has a ramp.

So that's where I passed out. After I threw up, I passed out. Did not – I was not aware where Mr. Davis went, but I did see him next morning with a bandage on. Now, Mister – our medic did not ask me – he came and I asked him, "Hey, how bad is Davis cut?"

He said, "He's got a pretty nasty cut."

"Really? But did you clean it up?"

He said, "Yes, I did. It's all taken care of."

"Okay. Good."

And he's like, "How did he do it?"

I told him, "Well, we did a blood oath and he cut himself too much." And Rodriguez, I told him the same thing, he's like – he's like, "Man, that's silly. I don't know what you guys doing." And that's about it.

Q. Now, you also gave a statement to the police. Is that correct?

A. Yes, I did.

* * *

[593] A. Yes, he was.

Q. Okay. Y'all had been drinking?

A. Yes.

Q. Y'all were drunk?

A. Yes.

Q. You said Davis was real drunk.

A. Yes.

Q. And y'all did this blood-oath thing?

A. Right.

Q. Where you cut your hand?

A. Right. We cut our hand in the palm, right in the palm.

Q. But he cut the back of his hand?

A. Yes. He went ahead and cut the top of his hand.

Q. This blood oath, is that to look after each other?

A. Yes. The blood oath, we actually – I don't recall that movie we saw it, but I seen it; and it's an oath you take where you shake on blood and you become brothers, blood brothers; and you promise to each other you're going to take care after each other and no matter what happened, you're going to stick together.

Q. So when Burgoyne called you "little brother" the night y'all went back out there to the wooded area by Milgen Road, that's because of this?

A. Yes.

* * *

[658] did to determine whether he intended to be in on this crime or not.

And, ladies and gentlemen, the Judge is going to charge you one other or many other important principles of law, but one of them will be the law of conspiracy. And the Georgia law of conspiracy is that a conspiracy is an agreement by two or more people to do an unlawful act. And the existence of a conspiracy may be proven by acts and conduct as well as by proof of an express agreement.

When persons associate themselves in an unlawful enterprise, any act done by any party to the conspiracy to further the unlawful enterprise is considered to be the act of all the conspirators.

Now, ladies and gentlemen, the Court will also tell you, the presence, companionship and conduct before and after the commission of the alleged offense may be considered by you in determining whether or not such circumstances give rise to the inference of the existence of a conspiracy.

Now, ladies and gentlemen, I submit to you that in this case that we've got right here, that Navarrette and Martinez both wanted Davis [659] dead; that the evidence shows a conspiracy between these two early on.

You know, Davis was mistreated, beaten up by these two in Iraq. Wulff, unimpeached, no reason to not tell the truth, came in this courtroom on two occasions and said that – Medic Wulff, that Davis came to him cut, described what had happened, the blood-brother thing; said he was cut with a box cutter; said that Martinez and Navarrette beat and

choked him; and said that he was afraid they were going to kill him.

And then some months later, Martinez and Navarrette are both present when he is killed. That, I submit to you, allows you to draw the inference of the existence of a conspiracy. That didn't happen out of the blue. Wulff thought it was child's play. He thought it was drinking activity; but I submit to you, ladies and gentlemen, a month later they're there when he's killed. And we know Martinez did the killing. That's almost – that's unrefuted and uncontradicted in this courtroom. Nobody has testified anyone other than Martinez killed Richard Davis.

Now, ladies and gentlemen, on July 12th or 13th they all go out. In the club and before

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[665] Navarrette in his testimony said he wasn't thinking straight. In his statement, he said the statement – he implied the statement was not recorded properly. Detective Blackstock said that it was taken down word for word.

Navarrette also said that Medic Wulff didn't look at his hands over in Iraq. But we put Wulff back up to say that he did. He said Burgoyne was at the blood-brother incident in Iraq. Wulff said Davis said he wasn't there, and nobody else said Burgoyne was present at the blood-brother incident either. He said that he found out he was charged with murder after he gave his statement. Ladies and gentlemen, you

know from the testimony of Detective Blackstock that defendant Navarrette filled out this form and signed it or at least signed it. And up here at the top it says he was charged with murder. Detective Blackstock said he told him he was charged with murder.

Now, ladies and gentlemen, Navarrette is not telling us the truth about these smaller things. So I submit to you, you are authorized to consider that he ain't telling the truth about the rest of it either. You know, who's going to help do a murder with three people who can turn you in? [666] Would Martinez kill Davis around people he couldn't trust, who wouldn't help him, that he was afraid of? And he was right. He wasn't turned in. He was only caught because Burgoyne ran his mouth about it. But not to the police, to a fellow soldier.

This is not a case, as the Defense would have you believe, where someone is in the presence of a crime and is charged and caught up with the crime when they didn't do anything.

Under these facts and circumstances I submit to you, because of what happened in Iraq, because of what happened at the club, because of what happened in the car, because of what happened on Milgen Road, across the street, you're authorized to consider, based on these acts and circumstances of Navarrette and what he did, that he was a party to this thing. He's not telling the truth about the little things. His plan as he mentioned it, is absolute hogwash.

Now, ladies and gentlemen, Martinez didn't kill Davis in front of somebody who was going to not help him cover it up. Every one of them helped him cover it up, including Woodcoff – everybody, everybody. All four of these men act like they're guilty. The actions of each one of

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[672] But, ladies and gentlemen, we read the statement by the police officer and he testified – officer Blackstock said, as you will recall, "Davis was being rude to a girl. We got in Martinez's car. I got into a fight with him. After I got into a fight, everybody said that they were going to go home. Davis was in the middle asleep. Martinez started driving. Burgoyne started hitting Davis. As we were pulling out, I started hitting Davis.

"I remember pulling off the road in the tree line." And these are his words, not mine. "Burgoyne got pissed off. And Martinez said at this point, 'Do you want to do it here, homes?'" Now, obviously, he meant do you want to kill him here. And we know that Martinez and Navarrette are friends from Iraq. Davis said they were beating on him and choking him in Iraq. He thought they were going to kill him. And Martinez says, "Do you want to do it here, homes?"

Burgoyne pulled Davis out of the car. Navarrette said he saw Martinez with my knife, his knife. And he asked, "What are you doing? And I asked, "'What are you doing?'" He, Martinez, said he fucked up, homes,

speaking to me. "I asked, 'What are you going to do.' He said, I'm going

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[674] out? He told the police he cleaned it out the next day himself when he was arrested.

And also in his statement he said, talking about going back to move the body, "So we drove to the wood line. I was standing outside looking at the road. I don't know what B was doing, then B told me, 'Let's go. Let's go.' And then Martinez drove up' we got on and drove off. The next day I woke up in the barracks."

Now, ladies and gentlemen, Martinez, according to Navarrette, Woodcoff and Burgoyne, is the one who killed him. Navarrette, I submit to you, is guilty of concealing a death. We understand he went back. He was the lookout. He didn't want to admit it. He claimed he had a plan but he went with them. He went back.

Ladies and gentlemen, I submit to you that under this evidence, with the treatment of Navarrette and Burgoyne of Davis, the way they had treated him in Iraq, he and Burgoyne beating on him in the car, that Navarrette was not surprised when Martinez said, "Let's do it here, homes."

His actions before and after the crime, not what he says, his actions in having animosity with Davis, his actions after the crime in covering it up, in hiding the body, I submit to

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[676] worried about Davis. That Davis was squared away. But he didn't help Davis. He didn't report as he testified to. He didn't tell his chain of command. He left him in the woods. And we've got his word, his word on all of that.

Navarrette is lying about the little stuff in his statement, about Wulff, about what happened in Iraq, about doing the cover-up. He's lying because of his – he knows he's guilty and he's got to explain his actions in some way that are not consistent with the guilt that we – I submit to you, that he's got. He's even saying he's not guilty of concealing a death.

Ladies and gentlemen, in Georgia law that simply means doing an act to conceal from law enforcement the cause of a person's death. And when he went along to move that body, I submit to you, he's guilty of that. Woodcoff's pleading guilty to it, and he did not go along to move the body. So that's how broad the law of concealing a death is.

Now, ladies and gentlemen, three witnesses say Martinez did it. Using good common sense, recognizing the law in this case, the law of intent which says that the State can show the criminal intent of a person by acts and conduct of

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[735] Martinez's statement, let's do it here, homes. Martinez's statement, he fucked up, homes. Circumstantial evidence. Credibility. The Court will

charge you that you are to decide the credibility of all the witnesses, who's telling the truth, who's not telling the truth, including this defendant, Mario Navarrette because he decided to take the stand. You must judge his credibility as well.

You heard testimony from Mr. Davis, the crime scene investigators that took the photographs, different things like that. You heard from Medic Wulff, Mr. Davis' best friend. As heard time and time again, Mr. Davis may have not had that many friends, he went to his buddy. "They choked me, they cut my hand, they punched me." Why would Medic Wulff lie. Why would he make up that story. He's out of the Army, even though he's working on the base, he doesn't have any dealings with any of the people that were involved. Why. Why would he make that story up.

But one thing that's interesting about the defense attorney's argument about Medic Wulff, there's two pieces of testimony that they left out in their argument. When Medic Wulff goes up to Martinez and ask him, after they get back to Fort

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[750] The body being found like that, that's what they have to remember. That's their last image of their son. They don't never get to see him again. His little girl can visit him while he's been here the last two years; can they visit their son? No. Will they ever talk to him again? No. Can Mr. and Mrs. Davis have a grandchild, because their daughter has Downs Syndrome? No. Think about the true victims in this case.

Also this blood-brother oath. Where's Pruitt? Why didn't they call Pruitt if Pruitt was there? They're in the same squad, same platoon. Why didn't they call Pruitt? He could have straightened the whole matter up. Why didn't they call him. Why didn't they call Rodriguez? He could've straightened the whole matter up about the blood-brother oath. Why? Third ID just got back; they started coming back the end of December. Why didn't they call him? Why, because it wasn't the truth. That's why they didn't call him.

There has been no evidence that Navarrette wanted to go to take that young man to the hospital. That statement, well I didn't know I was being charged with murder. It was right there. It's right there. State's Exhibit Number

* * *

IN THE SUPERIOR COURT
OF MUSCOGEE COUNTY
STATE OF GEORGIA

State v. Mario Navarrette

Count 1	Murder	___ Guilty	✓ Not Guilty
Count 2	Felony Murder	✓ Guilty	___ Not Guilty
Count 3	Aggravated Assault	✓ Guilty	___ Not Guilty
Count 4	Poss. of A Knife During the Commission of a Crime	✓ Guilty	___ Not Guilty
Count 5	Armed Robbery	___ Guilty	✓ Not Guilty
Count 6	Concealing a Death	✓ Guilty	___ Not Guilty

Foreperson /s/ [Illegible]

Date 1-27-06

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY, GEORGIA

FINAL DISPOSITION

STATE OF GEORGIA

VS

Marlo Navarrete

OFFENDER TRACKING NUMBER
117901114/108623935

SID NUMBER _____

CRIMINAL ACTION NO *SU 04 CR 566*

OFFENSE(S) Ct (1) – Murder; Ct (2) – Felony Murder; Ct (3) – Aggravated Assault; Ct (4) – Poss of a Firearm or Knife during the Commission of a Crime; Ct (5) – Armed Robbery; Ct (6) – Concealing the Death of Another

December TERM, 20 *05*

App. 77

☐ PLEA		☒ VERDICT	☐ OTHER DISPOSITION
☐ NEGOTIATED	☒ JURY ☐ NON-JURY	☒ GUILTY ON COUNT(S) *2,3,4,6*	☐ NOLLE PROSEQUI ORDER ON COUNT(S) _____
☐ GUILTY ON COUNT(S) __		☒ NOT GUILTY ON COUNT(S) *1, 5*	☐ DEAD DOCKET ON COUNT(S) _____
☐ NOLO CONTENDERE ON COUNT(S) __		☐ GUILTY OF INCLUDED OFFENSE(S) OF __ ON COUNT(S) __	
☐ TO LESSER INCLUDED OFFENSE(S) ___ ON COUNT(S) __			(SEE SEPARATE ORDER)

☐ DEFENDANT WAS ADVISED OF HIS/HER RIGHT TO HAVE THIS SENTENCE REVIEWED BY THE SUPERIOR COURTS SENTENCE REVIEW PANEL

☒ FELONY SENTENCE ☐ MISDEMEANOR SENTENCE

WHEREAS, the above named defendant has been found guilty of the above stated offense, WHEREUPON, it is ordered and adjudged by the Court that said defendant is hereby sentenced to confinement for a period of Ct (2) – Life; Ct (3) – 20 years to run concurrent with Ct (2); Ct (4) – 5 years to run consecutive to Ct (2); Ct (6) – 10 years to run consecutive to Ct (2)

In the State Penal System or such other institution as the Commissioner of the Georgia Department of Corrections may direct, to be computed as provided by law. HOWEVER, it is further order by the Court

☐ 1) THAT the above sentence may be served on probation

☐ 2) THAT upon service of _____ the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as a part of this sentence.

☐ GENERAL CONDITIONS OF PROBATION

The defendant, having been granted the privilege of serving all or part of the above-stated sentence on probation, is hereby sentenced to the standard general conditions of probation:

☐ 1) Do not violate the criminal laws of any governmental unit.

☐ 2) Avoid injurious and [illegible] habits – especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.

☐ 3) Avoid persons or places of disreputable or harmful character.

☐ 4) Report to the Probation Officer as directed and permit such Officer to visit him (her) at home or elsewhere.

☐ 5) Work faithfully at suitable employment [illegible] as may be possible.

☐ 6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.

☐ 7) Support his (her) legal dependents to the best of his (her) ability.

☐ 8) Defendant shall submit to urinalysis at the request of the Probation Officer for testing or dangerous drugs, narcotics, or controlled substances. Defendant shall be liable for all costs of urinalysis.

☐ OTHER CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of ___ plus $60 or 10%, whichever is less pursuant to O.C.G.A. § 18-29-70, and pay restitution in the amount of ___ Probation Fee ___ Court Cost ___ Attorney's Fees ___ Crime Lab Fee ___

Payments are: _____

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of the probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting from the amount of the time the defendant has served on probation.

The defendant was represented by the Honorable William Wright Attorney at Law, MUSCOGEE County by [Employment] [Appointment]

By the Court /s/ _____, 20 ___

So ordered this 30 Day of *January*, 20 06 /s/ William J. Smith
Judge Superior Court

Certificate of Service – This is to certify and acknowledge that a true and correct copy of the Final Disposition has been delivered in person and the defendant has been duly instructed regarding the conditions set forth.

This _____ Day of _____, 20 ___

_____